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No. 81-132

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED ELECTRIC CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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Petitioner, a subcontractor on an Air Force contract, contends that the Court of Claims erred in dismissing this action against the United States to recover compensation due under the subcontract after the prime contractor and its surety failed to pay and the government allegedly retained funds owing on the prime contract.

1. According to petitioner's petition in the Court of Claims, in 1977 the Air Force awarded a $4,176,109 contract to Standard Conveyor Company ("Standard") for the design, fabrication, installation, and testing of a mechanized materials handling system at McClellan Air Force Base, California (Pet. App. A-17). In 1978 Standard subcontracted with petitioner to provide electrical components for the project (*ibid.*). Petitioner alleged that it fully performed the subcontract but that Standard, which filed a bankruptcy petition in 1979, failed to pay the subcontract price, $107,958.42 (*ibid.*).

Petitioner further alleged that the government required Standard to post a payment bond of $494,665.50 under the contract pursuant to the Miller Act, 40 U.S.C. 270a, but that the amount of the bond was inadequate (Pet. App. A-18). Although petitioner demanded payment from the surety under the bond, the surety refused payment on the ground that the bond did not cover materials supplied by petitioner (*ibid.*).[1]

Petitioner then brought this action to recover the full subcontract price from the United States, alleging that it had an equitable lien on the sum retained by the government under the prime contract (Pet. App. A-18). Relying on its prior decision in *United States Fidelity & Guaranty Co.* v. *United States*, 475 F. 2d 1377 (1973) (en banc), the Court of Claims dismissed the petition on the ground that petitioner lacks standing because there is no privity of contract between it and the government (Pet. App. A-1 to A-9).

2. The decision of the Court of Claims correctly applies settled law concerning the amenability of the United States to suit for damages. Moreover, the decision below does not conflict with any decision of this Court or of the courts of appeals. Further review is therefore unwarranted.

Petitioner's principal contention (Pet. 3) is that the Court of Claims' ruling conflicts with *Kennedy Electric Co.* v. *United States Postal Service*, 508 F. 2d 954 (10th Cir. 1974). Both the Tenth Circuit (*id.* at 959) and the Court of Claims (Pet. App. A-3 to A-4), however, recognized that the identity of the defendant is crucial in determining whether there is jurisdiction over a subcontractor's action. The defendant in *Kennedy* was the Postal Service, which is an independent establishment specifically authorized by 39 U.S.C. 401(1) to

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[1] Petitioner's suit against the surety was pending in the district court at the time of the decision below (Pet. App. A-2 n.1).

sue and be sued. Thus, sovereign immunity presented no obstacle to suit against the Service, which was found to be just as "amenable to the judicial process as is a private enterprise." *Kennedy Electric Co.* v. *United States Postal Service, supra*, 508 F. 2d at 960, citing *FHA* v. *Burr*, 309 U.S. 242, 245 (1940). The defendant in the present case, in contrast, is the United States. Jurisdiction of this action is therefore governed by the Tucker Act, 28 U.S.C. (& Supp. III) 1491, which provides only a limited waiver of sovereign immunity. As the court below correctly recognized (Pet. App. A-4), while Section 1491 authorizes suits based upon contracts, either express or implied-in-fact, petitioner has no such contract with the government. Accordingly, sovereign immunity mandated dismissal of the present action, a result that is consistent with long-standing precedent in the Court of Claims (see Pet. App. A-5 n.5) and that does not conflict with the Tenth Circuit's decision in *Kennedy*.[2]

Petitioner also contends (Pet. 9-10) that its action is authorized by 28 U.S.C. (& Supp. III) 1491 because it is a claim founded upon an Act of Congress, *i.e.*, the Miller Act, 40 U.S.C. 270a. Petitioner, however, concedes that "the Miller Act does not itself provide for payment of compensation by the United States * * *" (Pet. 9). In light of this concession, the court below correctly held (Pet. App. A-4 n.4) that this action is not founded upon the Miller Act for purposes of Section 1491. See *United States* v. *Testan*, 424 U.S. 392 (1976).

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[2]As the Tenth Circuit noted in *Kennedy* (508 F. 2d at 959):

> *[United States Fidelity & Guaranty Co.* v. *United States]* is a different case from that at bar. We do not have a standing question. Our suit is against an independent establishment having the power to sue and be sued.

Finally, petitioner asserts (Pet. 10-11) that it has a claim under an implied contract theory because when it supplied material to the prime contractor it performed the obligations of the latter to the government, thereby placing itself in the same position as a surety that pays a subcontractor's claim. This contention is basically a claim based on restitution or a contract implied-in-law. As the Court of Claims noted (Pet. App. A-5 n.5), 28 U.S.C. (& Supp. III) 1491 does not waive the government's sovereign immunity from claims based upon a contract implied-in-law. *Hatzlachh Supply Co.* v. *United States*, 444 U.S. 460, 465 n.5 (1980); *Merritt* v. *United States*, 267 U.S. 338, 341 (1925).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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